for The Defense

Volume 9, Issue 6 ~ ~ June 1999

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

LEGISLATIVE UPDATE

By Meg Wuebbels
Legislative Liaison

In the wee hours of the morning on May 7th the Arizona Legislature called it a "day" and issued their *sine die* proclamation wrapping up their Forty Fourth Regular Legislative session, on the 117th day of a 100 day scheduled session. All the new laws passed become effective **August 6, 1999**. Overall, it was a very successful year for the Legislature and for this office. My thanks to all of you who participated in this session. The changes to the criminal code are highlighted below:

CHANGES TO CRIMINAL CODE

Guilty Except Insane Release Hearings

13-3994(G)- states that persons placed under the jurisdiction of the Psychiatric Security Review Board (PSRB), pursuant to a finding of guilty except insane, are now only entitled to request a release hearing twenty months after their last release hearing. However, the medical director may request a release hearing at any time. Under the previous law, a person was entitled to seek a release hearing every six months. The law still requires that every person under the jurisdiction of the PSRB be reviewed for a release hearing every two years. It should be noted that in *State v. Helffrich*, 846 P.2d 151 (Ariz.App. Div 1 , 1992), the Court of Appeals in *dicta* discussed the sixth month hearing requirement. They intimated that met due process requirements were being met because the law was flexible and allowed the medical director to petition for a hearing at any time. That way the law was responsive to the possibility that a person's mental condition may change rapidly, and thus they may become a candidate for release even where release was previously denied as recently as six months ago. The court criticized an earlier version of this same statute because it required a 230 day mandatory commitment period before a release hearing could be held.

Victim's Rights

8-412 (A) & 13-4433- A victim may invoke their right not be interviewed regarding an alleged delinquent act or offense *witnessed* by the victim that occurred on the same occasion as the alleged delinquent act or offense, or filed in the same petition, complaint or indictment. This provision specifically overrules the Arizona Supreme Court's unanimous decision in *Champlin v. Sargeant,* 279 Ariz. Adv. Rep. 7 (1998).

Juvenile Education Records

15-141- A juvenile court may require a school district to provide the court with a juvenile's educational records when a juvenile has been accused of committing a delinquent or incorrigible act before the juvenile is adjudicated. Disclosure of these records must comply

(cont. on pg. 2) ☞

with the Family Educational and Privacy Rights Act of 1974. The purpose of this disclosure is to help the court effectively serve the needs of the juvenile prior to the adjudication.

Drug Court Programs

8-321 & 11-365- states that a prosecutor has sole discretion to determine whether to divert or defer prosecution of an offender. This is in reference to a person's eligibility to enter a "drug court program." It does not alter whether a judge can place a person into Drug Court at the time of sentencing, or whether other counties can set up a Drug Court similar to the one in Maricopa County.

13-3401- defines a "drug court program" as a program established pursuant to 13-3422 with the presiding judge and county attorney in a county for the purpose of prosecuting, adjudicating, and treating drug dependant persons. Persons who are in the "drug court program" may have their case dismissed at the end of the program. A "drug court program" is not the same as the post sentencing Drug Court currently being run by Judge Bolton in Maricopa County.

"13-1204(A)(12)- misdemeanor assault committed by either causing physical injury (13-1203(A)(1)), or touching with intent to injure, insult or provoke another (13-1203(A)(3)), and committed while a person is in violation of an order of protection is now a class 6 felony."

NEW CRIMES

Precursor Chemicals

Makes it illegal for a retailer to sell, or a person to possess above a specified quantity, any chemicals which may be used to manufacture an illegal drug.

13-3401(22)- adds ordinary ephedrine, pseudoephedrine, norpsuedoephedrine or phenylpropanolamine to the list of precursor chemicals. These substances can be sold only in blister packs which do not contain a total of more than three grams of ephedrine, pseudoephedrine, norpsuedoephedrine or phenylpropanolamine. (This amounts to approximately forty boxes of Sudafed or other type medicines.)

13-3401(30)- defines a "regulated chemical" as iodine, sodium acetate, acetic anhydride, hypophosphorous acid, or red phosphorus in bulk form and that is not a useful part of an otherwise lawful product.

13-3404- Any persons who sell or transfer these chemicals must report any suspicious transaction to the Department of Public Safety. There are numerous exceptions to this reporting requirement including: persons who hold valid licenses to transfer and sell these products; persons who are pharmacists or doctors; hospitals or other health care providers; the sale of a legal dietary supplement; or any other person who can demonstrate a lawful purpose for the transaction to the Department of Public Safety. Violations of the failure to report are either a class 5 (if it involves false or deliberately deceptive reporting) or class 6 felony (simple failure to report or maintain records).

13-3404.01- It is a class 2 felony to knowingly possess or purchase more than 24 grams of any of these precursor chemicals, or sell precursor chemicals knowing that the recipient of the precursor chemicals will use the material to manufacture dangerous drugs. It is a class 5 felony to sell, transfer or possess more than 24 grams of precursor chemicals without a permit, or purchase precursor chemicals from a person without a permit, or participate in a scheme designed to circumvent the prohibitions or limits on sales of precursor chemicals, or sell a precursor chemical to any person involving a cash or money order payment of $1000 or more.

Aggravated Assault

13-1204(A)(12)- misdemeanor assault committed by either causing physical injury (13-1203(A)(1)), or touching with intent to injure, insult or provoke another (13-1203(A)(3)), and committed while a person is in violation of an order of protection is now a class 6 felony.

Cruelty to Animals

11-1023- A person who releases an animal lawfully confined for scientific research, commercial, educational or for public event display or exhibition purposes is guilty of a class 6 felony.

13-2910- The crime of cruelty to animals is expanded to included failing to provide medical attention "necessary to prevent protracted suffering" of an animal under your physical control or custody, and includes knowingly or

(cont. on pg. 3)

for The Defense Copyright©1999

Editor: Russ Born

Assistant Editors: Jim Haas
Lisa Kula

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.

recklessly inflicting "unnecessary physical injury" (not defined) or death on any animal. Animal is defined to include mammals, birds, reptiles and amphibians. The penalties vary from a class 6 felony to a class 1 misdemeanor. It is a defense to the anti-cruelty law if you use poison around your own buildings to control rodents.

Theft by Extortion

13-1804- clarifies what constitutes theft by extortion and re-writes two sections previously declared unconstitutional by the Court of Appeals. Also creates an affirmative defense for any property lawfully obtained either by restitution, indemnification or compensation.

Misconduct Involving Body Armor

13-3116- it is a class four felony for a person to wear body armor, defined as clothing or equipment designed to minimize the risk of injury from a deadly weapon, during the commission of any felony.

SEX CRIMES

13-1423- Creates a new crime of violent sexual assault if, in the course of committing sex abuse, sex conduct with a minor, sex. assault, child molest or sex assault of a spouse, the person used, threatened to use, or discharged a deadly weapon or dangerous instrument or inflicted serious physical injury, or if the person has a historical prior felony conviction for a sex offense, then the person SHALL be sentenced to life imprisonment and the person shall not be released on any basis for the remainder of the person's natural life.

"13-3116- it is a class four felony for a person to wear body armor, defined as clothing or equipment designed to minimize the risk of injury from a deadly weapon, during the commission of any felony."

13-1407(B)&(E)- age of consent for sex abuse and sex conduct with a minor is raised from fourteen to fifteen, and the defense that a person, charged with sex abuse, whose actions were not motivated by a sexual interest now applies to victims under the age of fifteen.

Sexually Violent Predators

36-3701(6)(e)8-321 & 11-365- states that a prosecutor has sole discretion to determine whether to divert or defer prosecution of an offender. This is in reference to a person's eligibility to enter a "drug court program." adds to list of "sexually violent offenses" which may make a person subject to designation as a sex predator, any conviction for a felony offense that was in effect before September 1, 1978, that if committed on or after September 1, 1978 would be comparable to a sexually violent offense listed in this paragraph (which includes essentially all other sex crimes and homicide, assault, kidnaping and burglary if the act was sexually motivated.)

HIV and Other Testing

13-1210- Allows a law enforcement officer to petition the court for an order authorizing testing of a person for any life threatening communicable diseases, if that person has interfered with a law enforcement officer's official duties by biting, scratching or transferring blood or bodily fluids.
13-1415 - Requires the Department of Health Services to provide counseling along with the test results to persons with significant risk of exposure to HIV as a result of being a victim of a sex offense.

Community Notification Guidelines

Brings Arizona's Sex offender community notification guidelines into compliance with the Federal Jacob Wetterling Guidelines.
13-3821- Requires non-resident sex offenders, adult or juvenile, to register if they are employed full or part-time or enrolled full or part-time in any school in the State for fourteen consecutive days or thirty aggregate days in a calender year. The requirement for juveniles to register terminates when the juvenile reaches the age of 25.

13-3821(E)- requires sex offenders who are required to register with the county sheriff's office to renew their non operating identification every year. Previous statute only required registered to annually renew their driver's license.

SENTENCING ISSUES

13-604(U)- A person convicted of aggravated assault on a police officer pursuant to 13-1204(A)(1) or (2) (aggravated assault with serious physical injury or deadly weapon involved) SHALL be sentenced to imprisonment for no less than the presumptive term and is not eligible for suspension of sentence, commutation or release on any basis until the entire sentence imposed is served.
13-702- adds to the list of *aggravating* factors:
(12)- if a defendant was wearing body armor as defined in section 13-3116 during the commission of the offense.
(15)- if a person is convicted of negligent homicide, manslaughter, second degree murder under circumstances manifesting extreme indifference to human life, or aggravated assault causing serious physical injury or the use of a deadly weapon or dangerous instrument arising from an act that was committed while driving a motor vehicle with a BAC of 0.18 or more at the time of commission of the offense.
(16)- lying in wait for the victim or ambushing the victim during the commission of any felony.

Death Penalty

13-4041- allows the Supreme Court to appoint counsel for post-conviction relief proceedings once the Court has affirmed the defendant's conviction and sentence.

(cont. on pg. 4) ☞

Currently, counsel is appointed only after the mandate affirming a defendant's conviction and sentence is issued.
13-703 (C)- The spouse, child, parent or other lawful representative of a murdered person can make a written, taped or oral statement to the probation officer preparing the presentence report, which must then be included in the report. In evaluating mitigating circumstances, the judge must consider information presented by these individuals and the impact that the offense has had on them, but not any recommendation they may make as to the sentence a defendant should receive. This does not apply if the spouse, child, parent or lawful representative is the person changed with the murder. **This is an emergency measure and became effective April 29, 1999.**

Restitution

12-1551- The provision for a criminal restitution order to expire five years after the judge signs it, unless it is renewed, is replaced by a provision reciting that such order does not expire until it is paid in full.

Juvenile Probation

8-341(B)- Juvenile probation MAY continue until a juvenile's eighteenth birthday, except it shall NOT exceed a year unless (1) the juvenile has been charged with a subsequent offense AND, (2) the juvenile has been found in violation of probation AND, (3) the court determines that continued supervision is in the public interest AND, (4) the offense for which the juvenile was originally placed on probation does not involve the discharge, use or threatening exhibition of a deadly weapon.

MOTOR VEHICLE OFFENSES

28-672- In an accident where serious injury or death results, a court may order in addition to a $500 fine, that a person perform community service, and if community service is not completed the person's drivers' license shall be suspended.
28-1381- Persons convicted of a *second* offense misdemeanor DUI **shall** be ordered by the court to equip any motor vehicle operated by the person with a certified ignition interlock device for at least one year upon conclusion of the license suspension or revocation.
28-1382- Persons convicted of Extreme DUI (BAC of 0.18 or higher) **may** be ordered by the court to equip any motor vehicle operated by the person with a certified ignition interlock device for at least one year upon conclusion of the license suspension or revocation (*first offense only*). If a person is convicted of Extreme DUI a *second* time within sixty months, the court **shall** order the person to equip any motor vehicle operated by the person with a certified ignition interlock device for at least one year upon conclusion of the license suspension or revocation.
28-1383- Persons convicted of aggravated DUI for either a suspended license, or for a third DUI conviction within sixty months, **shall** be ordered by the court to equip any motor vehicle operated by the person with a certified ignition interlock device for at least one year upon conclusion of the license suspension or revocation.

Admin Per Se Exceptions

28-673 - Requires that a person involved in an accident resulting in death or serious physical injury submit to a breath, blood or urine test for purposes of determining alcohol concentration or drug content, if law enforcement has probable cause to believe that the person caused the accident or was issued a citation for any violation of Title 28.

OF INTEREST

Trial Court Funding Study Committee - Legislative Study committee composed of legislators, county representatives, members of the court, clerk's office, a prosecutor and public defender which shall review trial court funding, and the effective administration of justice with a goal of processing 90% of the cases within 100 days and 99% of the cases within 180 days.
Driver's License; Minors - Starting in 2000, you must be 18 to obtain a standard type driver's license (class D); a more restrictive type of driver's license (class G-same as class D except does not permit towing) is available for 16 and 17 year-olds who complete driver training and specified driving practice. Traffic survival school and license suspension are mandatory for drivers under 18 who commit moving violations.
Juvenile Corrections Employees; fingerprinting - A.R.S. 41-2814 requires that any person convicted of almost any felony and some misdemeanors (domestic violence and DUI) must be fingerprinted and is prohibited from working with juvenile offenders and committed youth. An exception is made for medical personnel and hospital employees and volunteers who provide care under the direct visual supervision of juvenile correction department employees.
Minority Youth Over Representation in the Criminal Justice System Study Committee - Creates a study committee of legislators, a juvenile prosecutor and public defender, a juvenile court judge, a juvenile probation officer, law enforcement officer, member from the

(cont. on pg. 5) ☞

***"Trial Court Funding Study Committee* - Legislative Study committee composed of legislators, county representatives, members of the court, clerk's office, a prosecutor and public defender which shall review trial court funding, and the effective administration of justice with a goal of processing 90% of the cases within 100 days and 99% of the cases within 180 days."**

administrative office of courts with juvenile experience, director of DOC and director of juvenile DOC, and members from the public. The committee will study issues related to the over representation of minority youth in the criminal justice system, including the number of minority youths incarcerated and detained, and analyze juvenile justice programs and policies that have been implemented statewide and their effect on minority youth.

Prisoner Correspondence - A crime victim may notify the Department of Corrections or Department of Juvenile Corrections that they do not wish to receive mail from the prisoner who committed the crime. It is then illegal for any prisoner to send mail to the victim or any member of the victims' family or household. Prisoners who violate this provision may lose earned release credits. **The statute becomes effective January 29, 2000.** (A.R.S. 8-392.01; 13-4411.01 and 31-235) ■

THE SUPERIOR RIGHTS OF A FOREIGN NATIONAL[1]

By Jim Kemper
Deputy Public Defender - Appeals

Have you ever wondered why your client, who is in this country illegally, has the same rights that you have? Or so you think. I mean, you were born or naturalized in this country, you are a citizen, you vote, you work your posterior off to pay taxes, you pledge allegiance to the flag and get misty eyed when the Star Spangled Banner is played and now you are representing, say, a Bulgarian national who has snuck into the U.S.A. and who has lately been caught red handed selling some nose-candy to a narc and he has all the rights that you have, to a jury trial, to confront witnesses, to remain silent, to compel the attendance of witnesses, and so forth. He even has a right to a free lawyer, which turns out to be you, even though he has never paid a single stotinka (look it up) in taxes here. How can this be?

"The paradoxical fact is that he actually has all the rights you have, plus one you don't have precisely because you *are* a citizen."

The answer is surprisingly simple. The Fourteenth Amendment, Section 1, begins by defining citizens as "All persons born or naturalized in the United States, and subject to the jurisdiction thereof...." It then guarantees, against state abridgement, "...the privileges or immunities of *citizens* of the United States...." (emphasis added). But in the very next clause guaranteeing due process of law, and equal protection of the laws, it uses the word *person*. It is this careful distinction between *citizen* and *person* which gives our hypothetical Bulgarian his rights, because most of them exist through the operation of the Due Process clause. The Bulgarian may not be a *citizen*, but he is definitely a *person*.

If you conclude from this, however, that our Bulgarian has the *same* rights you would have in an Arizona court you would be wrong. On the contrary, all we have established is that he has *at least* the same rights you would have. The paradoxical fact is that he actually has all the rights you have, plus one you don't have precisely because you *are* a citizen. It is this right we are here to talk about because - while we don't represent many Bulgarians - we do represent many foreign nationals and we are here to protect their rights, paradoxical or not.

The United States is party to a treaty called the Vienna Convention on Consular Relations. The Supremacy Clause of the federal constitution[2] makes any treaty entered into by the United States the supreme law of the land, which means that all American courts, whether state or federal, are obligated to honor and enforce any right created by such treaties, just as they are obligated to honor and enforce the Bill of Rights. Article 36(1)(b) of the Vienna Convention says this:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.* (emphasis added).

What this says, in plain English, is that if a Mexican or any foreign national is arrested in Maricopa County the local authorities have to tell him as soon as they can (it's hard to think of something that would prevent them from telling him immediately) that he has a *right* to have them inform his country's consulate about the arrest, and a *right* to have the arresting authorities forward his communications to that consulate. These treaty-created rights can be enforced, thanks in part to a recent decision by the United States Court of Appeals for the Ninth Circuit.

(cont. on pg. 6) ☞

In *United States v. Lombera-Camorlinga*,[3] decided on March 25th, the defendant got no further into the United States than the Port of Entry, whereupon inspectors found 39.3 kilos of marijuana under his floorboard. Mr. Lombera-Camorlinga was a Mexican national, yet even though he was *Mirandized* he was not told of his rights under the Vienna Convention. The defendant then confessed.

Writing for a unanimous panel Judge Pregerson made it a point to say that most violations of the Vienna Convention go unredressed because defendants don't raise the issue, which is to say their lawyers don't raise the issue, which is probably to say the lawyers don't know about the treaty or the rights that spring from it. But the lawyer in this case had the good sense to file a suppression motion, which was denied by the trial court.

". . . most violations of the Vienna Convention go unredressed because defendants don't raise the issue, which is to say their lawyers don't raise the issue, which is probably to say the lawyers don't know about the treaty or the rights that spring from it."

The Ninth Circuit reversed. First, the court ruled that a defendant's rights under the treaty are *individual* rights, which the defendant has standing to enforce. It observed that the language of Article 36 (1) (b) is mandatory. It then held that the defendant's statements should be suppressed if he could establish that he was prejudiced by the failure of the authorities to advise him of his treaty rights, although the government could rebut this:

> Upon a showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention. If the defendant meets that burden, it is up to the government to rebut the showing of prejudice.[4]

You should have many opportunities in your practice to put these principles to work. Indeed it is a fair guess that you will have the chance in any case where your client is a foreign national, and where he has made incriminating statements. You will want to ask your client if he was advised of his rights under the Vienna Convention. And of course you will want to interview the arresting officer(s) to ask them whether they advised your client of his right to have his consulate informed of the arrest. My own guess is that few law enforcement people know about this since it is apparent that very few lawyers know about it.

If you determine that your client was not informed of his rights under the convention then you will have to determine how he was prejudiced by the failure to advise. This showing of prejudice, if you can make it, will obviously turn on the facts of each individual case; one thing you might want to do, in seeking a way to show prejudice, is to contact the relevant consulate to find out what would have happened if it had been informed in a timely fashion of your client's arrest.

Once you have concluded that your client was not advised of his rights under the Convention, and that you can show how he was prejudiced, you must - in order to be effective - file a suppression motion. In such a motion, as in every situation where you are attempting to vindicate a federal right, it is *absolutely imperative* that you specify the source of the federal right which you claim was violated. If you don't do this, with absolute specificity (and absolute correctness as well), then chances are your client will not be able some day to take his claim to federal court, the ultimate vindicator of federal rights. Without such specificity and correctness some federal court at some time in the future will say your client has *procedurally defaulted* his claim.

In the body of the *Lombera-Camorlinga* opinion the only constitutional source mentioned is the Supremacy Clause. But it is always better in this business to do too much than it is to do too little and I have a concern that some day, with respect to a suppression issue coming up from a state court, some appeals court will say that the Supremacy Clause is not a source, but a declaration of priority, and you have procedurally defaulted the issue because you didn't tell the lower courts the source of the right. Hence I think your suppression motion should say something like my client's right were violated, rights he has under Article 36 (1) (b) of the Vienna Convention on Consular Relations, which was entered into by the United States pursuant to the treaty power of the President as set out in Article 2, section 2, clause 2, which is controlling pursuant to the Supremacy Clause, Article 6, clause 2.

The requirement of this degree of specificity may smack of some tedious, medieval, theological debate about how many angels can stand on the head of a pin, but that's just the way it is. ■

1. I am indebted to my colleague Patrick E. McGillicuddy, Esq., for the idea which led me to write this.
2. Article VI, clause 2.
3. 170 F.3d 1241.
4. *Lombera-Camorlinga*, 170 F.3d at 1245.

WILL JUDAS TURN YOUR CLIENT OVER FOR THIRTY YEARS OF SILVER? HOW TO DEFEND AGAINST ACCOMPLICE TESTIMONY

By James P. Cleary
Deputy Legal Defender

In historical context, one of the premier snitches in western civilization is none other than Judas Iscariot. For a mere thirty pieces of silver, he set into motion a significant persecution in the history of western civilization.

The dynamics of that snitch deal, remarkably, are still played out in criminal prosecutions in modern times. A known, or suspected, collaborator of a government suspect is induced to provide information or testimony for other than altruistic reasons in order to convict the prosecution's choice of the least favored in a class of suspects. Litigation histories reveal that such inducements have been known to include: reduced charges or sentences[1], money [2], improvement in living conditions or even a new identity. [3]

"Preparing to challenge the accomplice's testimony and test the motives, biases or prejudices may well be the difference between conviction and acquittal for your client."

Constitutional requirements provide that the snitch, if he or she chooses to testify in court against the prime prosecution target, must face the filter of cross-examination by the accused's counsel.[4] Wide latitude is afforded an accused's counsel in that cross-examination to ferret out the motives, biases or prejudices which may truly be the basis for the testimony inculpating the accused.[5] Often, the accomplice/snitch testimony may be the only factual support for the prosecution's case. Preparing to challenge the accomplice's testimony and test the motives, biases or prejudices may well be the difference between conviction and acquittal for your client.

The Deal

Upon discovery or notice that your client will face a testimonial assault by an alleged accomplice/collaborator in a crime, the first task is to discover what the "deal" is between the prosecution and the accomplice. It is rare that an accomplice will open his/her mouth at trial for nothing. Usually a plea agreement is a good starting place to determine the parameters of any "contract" between the accomplice and the prosecution. It may well reveal reduction in charges, dismissal of charges or sentencing considerations that have been afforded the accomplice in exchange for his/her testimony.[6] Further, it may reveal the length of the "contract," e.g., in the event of any retrial, as well as any requirements for the quality of the testimony, e.g., truthful.[7] If an actual plea has occurred, a transcript of the plea proceedings would be helpful to see what the factual basis for the plea was. Did the accomplice relate the facts? The prosecutor? The defense counsel?

An accomplice's testimony is theoretically premised upon the notion that it is and will be truthful. Of course, it would be fair cross-examination, before a jury, to determine the accomplice's understanding as to who determines whether the testimony that is provided is truthful. Does the accomplice decide? Does the court decide? Does the prosecutor decide? Does the jury decide? Or, has it already been determined that the testimony is truthful? And, when and where was that determination made? It is always entertaining to have a snitch explain his/her understanding of the truth in front of disinterested jurors. Philosophers could not come up with more arcane or esoteric meanings of truth than a snitch.

Impeachment

Once an accomplice has developed the "truth" on his/her direct examination at trial, it is time for the defendant to test the truth. The resources for impeachment are bountiful.

There may first be the physical evidence. Medical examiner reports, crime scene diagrams, pictures and expert forensic opinions may well be at odds with the version of the truth proffered by an accomplice. Of course, this requires close scrutiny of the accomplice's language and words designed to paint the truth.[8]

An accomplice's prior record, whether it be adult or juvenile, is also grounds for testing his/her credibility.[9] The nature of a conviction may tell much about the accomplice's truth. Police reports which detail prior statements of an accomplice may well reveal the inability of an accomplice to be truthful with police. It is not a leap of logic, or speculation, to question why an accomplice can be truthful to a jury when he/she has a penchant for lying to the police.

Of course, often accomplices have seen the light, or otherwise been rehabilitated, in the errors of their prior ways by the time they testify. They may have had substance abuse counseling, or therapy; perhaps even

(cont. on pg. 8) ☞

hypnosis[10] to rectify their past misguidance. Records of such treatment may well aid in impeachment of the accomplices' version of the truth.[11] If prior pre-sentence reports are available, they often contain histories of the accomplices as well as statements of theirs which may contradict their testimony at trial.

Juries often like to focus on the statements of other witnesses who testify at trial, as unbiased witnesses. They may well be witnesses who simply may, or may not, have heard gunshots, or screams or other sounds at the time of the alleged crime. They may have seen individuals with a certain description at the time of the alleged crime. Their testimony can often be at odds with the truth developed by the accomplice.

The preferred, and usually the most effective, method of impeaching an accomplice may be his/her own prior statements, written or oral.[12] Inconsistent ones usually are the most beneficial. But, even consistent ones, with a different twist can be effectively utilized. Their statements can be found in police reports, on audiotapes, videotapes and other methods utilized to preserve statements made to police personnel. Additionally, letters to family or friends, or even co-defendants, can be used.

A true bountiful garden of information may be "free talks" or polygraph examinations. While polygraph results may not be admissible at trial [13], certainly the answers provided during those examinations may be admissible to challenge direct examination testimony. "Free talks" [14] also provide ammunition as the accomplice often will be "puffing" during those talks in order to persuade the authorities that his/her version of the truth is the best one available for sale. It is not uncommon to discover major faux pas in those talks which can directly challenge the accomplice's ability to be truthful. In a recent case, an accomplice boasted in one such "free talk" that his goal throughout the trial preparation process was to "outfox the prosecutor." An argument was easily made that the accomplice's goal to " outfox the prosecutor" had extended to the objective to "outfox the jury."[15]

"With proper research and preparation, an accomplice may be successfully discredited and your client's fate rests entirely on the physical evidence, or lack of it."

Intangibles

While there may be many sources to aid in the cross-examination of an accomplice, all things discovered may prove inadequate when the accomplice takes the oath and sits in the witness chair in the courtroom. It is at this time that instinct and experience must also be used.

The Confrontation Clause also implicates the right to a face-to-face encounter.[16] In most situations the face-to-face encounter has been rehearsed with the prosecutor and the accomplice's attorney. However, the beauty of cross-examination is the spontaneity it allows the examiner in confronting the witness. The accomplice's body-language, facial expressions and nervous gestures should be easily catalogued during the direct examination. When they appear on cross-examination, they should be clues that the accomplice's version of the truth is under stress. Using those clues to present the various forms of impeachment can impact favorably on the impressions of the jurors.

Conclusion

Automatically, an accomplice, or immunized witness, is laboring under a credibility handicap. His/her own criminal involvement tarnishes his/her image and the deal received provides the jury with a plausible reason as to why the witness is testifying for the government, possibly even untruthfully. While most accomplices who testify against a co-defendant are advised that honesty is the best policy in answering questions in the witness chair, even a properly prepared witness cannot easily abandon old habits for untruthfulness. With proper research and preparation, an accomplice may be successfully discredited and your client's fate rests entirely on the physical evidence, or lack of it. ■

1. *See, State v. Towery*, 186 Ariz. 168, 177, 920 P.2d 290, 299 (1996) (accomplice receives reduced murder charge and elimination of death penalty for testimony).
2. *See, State v. Dunlap*, 187 Ariz. 441,453, 930 P.2d 518, 531 (Ariz. App. Div. 1 1996) (accomplice testimony motivated by financial gain for family member due to information against others which would result in split of moneys received by investigator retained by those accused by accomplice); see also, *State v. Gertz*, 186 Ariz. 38, 42, 918 P.2d 1056,1060 (Ariz. App. Div. 1 1995) (hiring of civil lawyers to proceed against defendant in civil suit admissible to show motive or interest in financial gain by testimony).
3. Various amenities provided by federal law include: documents for new identity; housing; transportation and moving expenses; living expenses; employment; security systems for protection. See, 18 U.S.C. sec. 3521(b)(1) (A) - (I).
4. *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-10, 39 L.ED.2d 347 (1974; *State v. Dunlap,* 125 Ariz. 104, 105, 608 P.2d 41,42 (1980) (confrontation clauses of state and federal constitutions require allowance of reasonable cross-examination of defendant's accuser).
5. *Davis v. Alaska, supra*; *Pointer v. Texas*, 380 U.S. 400, 403-404, 85 S.Ct. 1065, 1067-68, 13 L.ED.2d 923 (1965); *State v. Correll* 148 Ariz. 468, 473, 715 P.2d 721,726 (1986); *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985).
6. *See*, Yvette A. Beeman, *Note, Accomplice Testimony Under Contingent Plea Agreements,* 72 Cornell L.Rev, 800,824 (1987).
7. *See, State v. Fisher*, 176 Ariz. 69, 859 P.2d 179 (1993) (due process

(cont. on pg. 9) ☞

prohibits a plea agreement from conditioning leniency upon anything other than truthful and complete testimony;
further, confrontation and cross-examination rights allow challenge to testimony at trial to show testimony given is less than a full and truthful account and thus in breach of agreement with prosecution).

8. A technique for discrediting a witness is to expose inherent improbabilities in his testimony. The improbability may be contained in direct examination or exposed fully in cross-examination. An accomplice's proclivity to paint himself into a corner, or dig himself into a hole, may well damage his credibility immeasurably. *See*, *A Practical Approach to Cross-Examination: Safety First,* 25 UCLA LRev 547, 567 (1978).

9. Rule 609, Ariz. R. Evid.; *see also*, *State v. McKinney*, 185 Ariz. 567, 574, 917 P.2d 1214, 1221 (1996) (may not use juvenile record of witness for general attack on character); *State v. Salazar*, 182 Ariz. 604, 609-610, 898 P.2d 982, 987-988 (Ariz. App. Div. 1 1995) (juvenile probationary status of eyewitnesses at scene of shooting was probative of alleged bias in favor of State); *State v. Ruelas*, 165 Ariz. 326, 332, 798 P.2d 1335, 134 (Ariz. App. Div. 1 1990) (use of juvenile record to attack general credibility, and not to establish bias or motive improper under Rule 609(d)); *State v. Van Den Berg*, 164 Ariz 192, 194, 791 P.2d 1075,1077 (Ariz. App. Div. 1 1990) (juvenile witness probationary status subject to analysis under Rules 609 (d) and 404(b), Ariz. R. Evid.).

10. The fact that a witness has been hypnotized at a time prior to his/her testimony at trial can have preclusive ramifications. Normally, a witness who has been subjected to hypnosis will be permitted to testify with regard to those matters he or she was able to recall and relate prior to hypnosis. However, where the hypnosis was used for investigatory purposes, there must be a showing that the hypnosis procedure was performed in a manner designed to minimize the danger of contamination of both prehypnotic and posthypnotic recall. In the absence of that showing, the witness may be precluded from testifying at trial. *See*, *State v. Lopez*, 181 Ariz. 8, 887 P.2d 538 (1994).

11. *See*, *State ex rel. Romley v. Superior Court*, 172 Ariz. 232 836 P.2d 445 (Ariz. App. Div. 1 1992) (due process requires defendant right to subpoena and obtain medical records, or treatment records where witnesses'/victims' mental state at time of alleged offense will be at issue at time of alleged offense).

12. Rule 613, Ariz. R. Evid.

13. *See*, *United States v. Scheffer*, 523 U.S. 303 ,118 S.Ct. 1261, 140 L.ED.2d 413 (1998) (rules of evidence which exclude polygraph evidence from admission at a trial do not abridge an accused's right to present a defense as long as they are not arbitrary or disproportionate to the purposes they are designed to serve. However, the questions asked and responses given may well be admissible under other rules of evidence, as long as mention of the polygraph setting is precluded).

14. A "free talk" is a situation where, normally, the witness/accomplice, his/her attorney, the prosecutor and a law enforcement representative meet to review the witness's/ accomplice's factual knowledge concerning an offense. The statements made are immunized, to a degree, in that the prosecution agrees not to use such statements, or evidence obtained, against the accomplice in the event no agreement or plea bargain is reached with the witness/accomplice. It is not uncommon for there to be a written agreement setting out the parameters of the agreement or an audio- or videotape recording of the discussion.

15. *State v. Manjarrez,* CR 97- 07689(B), Maricopa County (defendant acquitted of felony-murder charges premised upon testimony of alleged accomplice).

16. *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

WHAT THE #@% ARE YOU DOING HERE?

By Helene F. Abrams
Juvenile Division Chief

You just finished reviewing your file again. The charge is Theft, a class 3 felony. You look over at the jury box. Alone at the end of the chain sits a boy, age 14. The men's size small black and white striped shirt with the yellow capped sleeves is swimming on his not yet developed shoulders and arms. The acne has just started. He is small, about 5 feet tall you'd guess, weighing in at about 90 lbs. He looks terrified.

"You walk over to the jury box wondering, 'What the #@% is this child doing here?'"

You walk over to the jury box wondering, "What the hell is this child doing here?" You extend your hand when you get to your client and introduce yourself. Now, out loud, you say, "What the hell are you doing here?" Your client begins to cry. You wait a minute as the tears run down his face. " What's the matter?" you say. He responds: "My mom doesn't like me to hear swear words." You search for the tissues, one for each of you. (These are readily available everywhere in the juvenile court).

Check The Statutes

You look back at your file. You remember a long time ago (time is a relative thing, it was probably about two years ago) someone said that theft was specifically excluded from the laundry list of offenses that could land a child in criminal court. You open your book and look to A.R.S. §13-501, which says:

§13-501. Persons under eighteen years of age; felony charging; definitions

> A. The county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of any of the following offenses:
>
> 1. First degree murder in violation of §13-1105.
> 2. Second degree murder in violation of §13-1104.
> 3. Forcible sexual assault in violation of §13-1406.
> 4. Armed robbery in violation of 13-1904.
> 5. Any other violent offense. (As defined in §13-501 (G)(5))

(cont. on pg. 10) ☞

6. Any felony offense committed by a chronic felony offender. (As defined in §13-501 (G)(2)).
7. Any offense that is properly joined to an offense listed in this subsection.

B. Except as provided in subsection A of this section, the county attorney may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least fourteen years of age and is accused of any of the following offenses:

1. A class 1 felony.
2. A class 2 felony.
3. A class 3 felony in violation of any offense in chapters 10 through 17 or chapter 19 or 23 of this title. *(Footnote omitted)*
4. A class 3, 4, 5, or 6 felony involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.
5. Any felony offense committed by a chronic felony offender.
6. Any offense that is properly joined to the offense listed in this subsection.

Sure enough, theft is not included as an offense that a 14 year old could be charged with in adult court pursuant to section A or B (1-4). It is specifically excluded in B (3). It is the only offense so it is not "joined" with any other offense.

So What the Heck (You've Learned!) Are We Doing in Adult Court with this Kid???

The only category that might fit is discretionary direct filed chronic felony offender. (A.R.S.§ 13-501 (B)(5)). So now what do you do? First, check to see if the state has filed the NOTICE required under 13-501 (D). The notice is required to be filed "at the time" the county attorney files a complaint or indictment. Do you have the notice? What does it say? If you don't have the notice, what do you do?

If you don't have the notice, a motion to dismiss should be filed as the criminal court does not have jurisdiction over this 14 year old unless he is a chronic felony offender. Of course, if you move to dismiss because the notice is not there, the state will probably promptly file one. If they are smart, their response to your motion will be the notice.

Does the notice merely allege that the child is a chronic felony offender? What is a chronic felony offender? ARS §13-501 (G)(2) defines a chronic felony offender as:

> . . . a juvenile who has had two prior and separate adjudications and dispositions for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult.

"Does the notice merely allege that the child is a chronic felony offender? What is a chronic felony offender?"

Two prior and separate adjudications and dispositions means exactly what it says: each felony must be adjudicated on a date different from the other and the dispositions must also be on a different date for each adjudication. So if you entered into a plea agreement to plead to two felonies committed on different dates, even if alleged in different petitions, and then go to disposition on a different date, THIS IS ONE PRIOR. The point is that the child should get the benefit of court intervention before a prior is useable.

No matter what the notice, if you have one, you should ask for a hearing pursuant to A.R.S. §13-501(E), which provides:

> Upon motion of the juvenile the court **SHALL** hold a hearing after arraignment and before trial to determine if a juvenile is a chronic felony offender. At the hearing the state shall prove by a preponderance of the evidence that the juvenile is a chronic felony offender. If the court does not find that the juvenile is a chronic felony offender, the court shall transfer the juvenile to the juvenile court pursuant to §8-302. If the court finds that the juvenile is a chronic felony offender or ***if the juvenile does not file a motion to determine if the juvenile is a chronic felony offender, the criminal prosecution shall continue.*** (Emphasis added)

So what do they have to show? Proof should include the usual stuff like live testimony, minute entries, fingerprints. Who can they call to prove these priors? The probation officer who had the child on probation? He or she probably was not at the disposition hearing. That

(cont. on pg. 11) ☞

probation officer may not be around anymore and is not likely to be able to identify your client anyway. Did the state provide you minute entries? On some old priors, the offense was not designated a felony or misdemeanor. In some cases, the adjudicated offense could be a misdemeanor or a felony.

You look through your file and find a document called a Juvenile Profile. It lists a number of charges, many of them look like felonies. The profile is not an official court record. It is a document on each child in the JOLTS (Juvenile On Line Tracking System). Reading this document can be challenging because the referred charge may be different from the charge actually filed which is hopefully different from the offense on which the child was adjudicated.

"There are some very good arguments why any 'felony' offense committed before July 21, 1997, whether adjudicated or disposed before or after the effective date of the changes, is not a usable prior felony."

Reading a Profile

The Juvenile Profile is a compilation of many different screens available on the court tracking system. The profile is divided into sections. The first section gives identifying information; name, DOB, SS number, court numbers, etc. The second section is the case overview section. It lets you know how many times the child has been detained or in placement and for how long. It also tells you how many complaints the child has had and how many are pending. The third section is family information. The fourth section is social data, where is the child living, what school is he attending, which grade is he in, and for whom is he employed. Next are placements and programs. This is basically a listing of the services provided to the child.

Complaint data is next. Each time a referral is made to the juvenile court, the court labels it a complaint. Often times there are many more complaints than petitions filed. (The petition is the formal charging document). Unlike adult court, where each new case is given a new number, juveniles are assigned two numbers when they first come into the system. One is a JV number and one is an F#. The juvenile keeps those numbers throughout his "career". Referrals or complaints are graded by the county attorney. If the grade is A, a petition is filed. Petitions are tracked by the date of the filing of the petition. It is not uncommon to have numerous complaints with only a few of them being filed on. Some complaints are "adjusted" which means the child completed some consequence and no petition was ever filed.

While interesting to see the grades and results of many of the complaints, the more relevant information is later in the profile in the Delinquent Petition section. This section will tell you which complaint number is being addressed, the date of the filing of the petition, what the disposition was, which charges were filed, which were dismissed, admitted (by plea agreement) and which were adjudicated (by trial). You need to check the specific charge on which the child was adjudicated, or which the child admitted, to determine if it is a felony, misdemeanor or probation violation. My review of a recent profile showed 11 complaints but only 6 petitions filed. Of those 6, 3 were probation violations, 2 were dismissed (one was a Possession of Marijuana and one was an aggravated assault, both "felonies"). Only one charge was a felony adjudication for robbery. That robbery adjudication occurred in September 1996, before the implementation legislation. You should never rely on the profile as "evidence" of priors. You should be receiving minute entries on all alleged prior felonies. Remember too that juveniles did not provide fingerprints on minute entries until July 21, 1997. Proving the "priors" even by a preponderance should be very interesting.

Prior, Not a Prior, Historical Priors

You should also be aware that, prior to July 21, 1997, the effective date of the legislation implementing Proposition 102, it made no difference if a child was adjudicated on a misdemeanor or a felony. The dispositional range was exactly the same, so there was little incentive to fiercely negotiate plea agreements. The law in effect up to July 21, 1997 expressly stated that the disposition of a juvenile in the juvenile court could not be used against the juvenile in any case or proceeding except the juvenile court (former A.R.S. §8-207). The warnings now given for a "felony" adjudication, which advise children about the future consequences of additional "felony" adjudications, did not exist. There are some very good arguments why any "felony" offense committed before July 21, 1997, whether adjudicated or disposed before or after the effective date of the changes, is not a usable prior felony. In fact, the question about whether a felony committed prior to July 21, 1997 can be a "first juvenile felony" is currently being considered by the Arizona Supreme Court.[1] These arguments should be part of the objection to the use of the older offenses as priors on juveniles and may be one of the ways to knock out one or both priors. Anytime the prior felony predates July 21, 1997, the objection is the first line of defense.

In addition, because it did not matter whether the offense was a felony or a misdemeanor, class 6 open-ends

(cont. on pg. 12) ☞

did not exist in juvenile court. Many priors may show as a class 6 but prior to July 21, 1997, it didn't matter. No one pled to an "open" offense in order to "earn" the misdemeanor. There is no "designation" of a felony and there may be an argument that all those 6's pre-July 21, 1997, could now be designated misdemeanors.

For those who pled to "opens" after July 21, 1997, many times they were not designated before the child was released from probation. As long as the child is not yet 18, you should request a designation hearing in the juvenile court. Even if you lose, you are no worse off since the "open" is being treated as a felony anyway. Like an adult, I believe, the child is entitled to notice and a hearing before designating an offense. *State v. Benson*, (App. Div. 1 1993), 176 Ariz. 281, 860 P.2d 1334. If the offense was designated a felony without your client's knowledge, you need a hearing to vacate the designation.

Remember too, that each felony must qualify as a historical prior: "conduct that would constitute a historical prior felony if the juvenile had been tried as an adult". There appears to be an exception in the definition of historical prior for drugs under the threshold amount. See A.R.S. § 13-604 (U) (1) (a)(i). Most kids do not possess more than the threshold amount of drugs. Most or all of their adjudications on drug offenses may not be allegeable priors. (Thanks to Vince Troiano for this information).

". . . encourage adult judges to look at kids as kids and not the crime, then maybe a change can occur."

Show Me the Numbers

How many kids are we talking about who have been filed on in adult court as chronic offenders? The RAPS (Research and Planning people) at the Juvenile Court ran some numbers for me. Since July 1, 1997, 2,886 complaints have been received alleging A.R.S. §13-501 offenses. Of those, 938 were filed in adult court. Of those, 343 were mandatory direct filings under §13-501(A) (excluding chronics), 348 were discretionary direct filings under §13-501(B) (excluding chronics) and 55 were filed pursuant to §13-501(C). Juveniles who were mandatorily direct filed as chronic offenders over the age of 15 totaled 143 and those who were discretionarily direct filed as chronics over the age of 14 totaled 49. (Thanks to Alison Vines for those numbers.) Maybe some of these arguments can help you get some of these kids back to the juvenile court.

Now What?

So if you can't get the child back to juvenile court by kicking out the priors, what do you do now? Did you know that if the child is prosecuted as a chronic felony offender and is convicted of a felony in criminal court and is placed on probation, *THE JUVENILE SHALL BE INCARCERATED IN THE COUNTY JAIL FOR A PERIOD OF NOT MORE THAN ONE YEAR AS A CONDITION OF PROBATION*. They must also be given another "notice" that if they commit another felony, they will be tried in adult court. The chronic offense just became a historical prior. See A.R.S. §13-501(C).

And when all else fails, how about following the suggestion of our Presiding Juvenile Court Judge Maurice Portley offered me in an e-mail:

> . . . encourage adult judges to look at kids as kids and not the crime, then maybe a change can occur. I would recommend that they (the attorneys) talk about child development, general immaturity, etc. and give the judge something to work with other than age, lack of adult priors and the other routine drivel. They can bring child development articles, etc. in an effort to demonstrate why kids should be treated differently. They could also recommend services that a youngster might need-age appropriate community service, family based counseling, etc.
>
> I know it may be a difficult sell, but a 14, 15, 16 or 17 year old may benefit by aggressive advocacy to a judge who's willing to listen. Just a thought.

One of the best recent articles I've read is by Steven Weller and titled "Dealing With Children as Defendants in Adult Criminal Court: The Importance of Understanding Juvenile Judgment and Cognition". I will be happy to share this article with anyone who wants it.

Please remember that we are all in this together. The inhabitants of the Juvenile Division are always available to help you in any way we can. Call us whenever. ■

1. To view the brief filed by David Katz, Maricopa County Public Defenders can look under s:\juvpriors.

ARIZONA ADVANCE REPORTS

By Terry Adams and Steve Collins
Deputy Public Defenders - Appeals

***State v. Musser*, 292 Ariz. Adv. Rep. 11 (SC, 3/23/99)**

The defendant called the Arizona Supreme Court to complain about a justice court. When advised that the Chief Justice was not available to take his call he said that he "might just have to show up on the judge's doorstep and discuss the matter at gunpoint." The state charged him with telephone harassment. He was convicted but the Court of Appeals reversed holding that the statute, A.R.S. § 13-2916A, was overbroad. The Supreme Court reinstated the conviction holding that the defendant did not have standing to challenge the statute because his conduct fell within the acts prohibited by the statute and this statute dose not pose such a threat to protected expression of parties not before the court to extend him standing.

***State v. Superior Court (Pawlowicz)*, 292 Ariz. Adv. Rep. 30(CA 1, 4/6/99)**

The state filed a special action from a trial court's ruling suppressing evidence of breath tests from an Intoxilyzer 5000 that had been supplemented with a keyboard and vapor recirculation attachment. The defendant argued that the tests were inadmissable because the administrating officer was not fully trained on the supplemented machine. Because there was evidence from the state's expert witness that both the old and new machines analyze alcohol in an identical manner, and that the change was only a different method of recording data and no additional training was necessary, the Court of Appeals granted the special action and ordered that the test was admissible.

***In re Devon G.*, 293 Ariz. Adv. Rep. 21 (CA 1, 3/9/99)**

The defendant, a juvenile, admitted to committing one count of criminal damage and agreed to pay restitution. At the disposition hearing he was ordered to pay restitution to one victim who had submitted a claim. A week later the state found two more victims that were requesting claims. The state filed a motion for a hearing. The court denied it as untimely. The state appealed. Because the trial court has jurisdiction over the juvenile until he's eighteen, and since it can modify conditions of probation at any time, the court held that the trial court must conduct a hearing. There is a case holding to the contrary, a Supreme Court opinion is likely to follow.

***Gray v. Irwin*, 293 Ariz. Adv. Rep. 14 (CA 1, 4/13/99)**

The defendant pled guilty to possession of dangerous drugs. He had a prior conviction for possession and one for forgery. He argued that A.R.S. § 13-901.01 (prop. 200) required that he receive probation. The trial court disagreed and sentenced him to prison, and this special action followed. The Court of Appeals held that § 13-901.01 clearly states that upon conviction of simple possession one must have two prior simple possession convictions for prison to be a sentencing option. One prior drug conviction requires probation. Since forgery is not a drug conviction the court must place him on probation.

***State v. Mills*, 293 Ariz. Adv. Rep. 7 (CA2, 2/25/99)**

The defendant was convicted of murder after a jury trial. During trial he was seen by jurors in restraints outside the courtroom. The court denied his motion for mistrial. This denial was upheld on appeal. The defendant requested that the jurors be voir dired which was taken under advisement but never accomplished. The court of Appeals held "[A]ppellant made no offer of proof to establish prejudice; although he did request that the court voir dire the jurors who saw him in restraints...he did not request permission to do so; and, he did not object when the court ultimately declined to conduct voir dire..." I put that in quotes so I wouldn't be accused of misinterpreting the holding, if that holding makes any sense to you, you are a better person than I. The court also found that there was no error in allowing the state to play a videotape of it's key witness' preliminary hearing testimony. This was because he changed his testimony completely and it was proper impeachment. The court also upheld the use of evidence that the defendant had previously cut the brake line of the victim's car. This was admissible to show plan, motive and intent. Finally the court upheld the trial court quashing the subpoena of a defense witness who was properly going to invoke the 5th amendment.

***State v. Reed*, 293 Ariz. Adv. Rep. 23 (CA 2, 4/13/99)**

Defendant's conviction of fraudulent schemes and theft were upheld. After the first day of trial, the defendant attempted suicide and was hospitalized. When he failed to appear for the second day, his attorney was unaware of the suicide attempt and could offer no explanation for his absence and the trial continued. A motion for new trial was made after these circumstances were discovered. A state's psychiatrist testified that the defendant made a "rational" decision. The appeals court found that the defendant voluntarily absented himself from the proceedings.

(cont. on pg. 14) ☞

***In Re Fernando C.*, 294 Ariz. Adv. Rep. 22 (CA 2, 4/29/99)**

A.R.S. § 13-901, the Drug Medicalization Prevention and Control Act of 1996 (Proposition 200), does not apply to juveniles. Therefore, a non-violent juvenile drug offender may be sent to prison.

***State v. Thompson*, 294 Ariz. Adv. Rep. 13 (CA 1, 4/27/99)**

The defendant was convicted of forgery and tampering with a public record. Both crimes require an intent to defraud or to deceive. It is unnecessary to establish a pecuniary loss in order to prove this element.

***State v. Wooten*, 294 Ariz. Adv. Rep. 3 (CA 1, 4/30/99)**

Wooten is the cousin of former Phoenix Sun Jerrod Mustaf. He was convicted of murdering Mustaf's former girlfriend who refused to have an abortion at Mustaf's request.

In anticipation of a lengthy trial, the jury commissioner prescreened prospective jurors before voir dire. Those indicating they would be unduly burdened by lengthy service were excused. Wooten argued this disproportionately excluded poor and minority jury panelists, violating the Sixth Amendment right to a fair trial, and was a denial of equal protection and due process. The Court of Appeals disagreed.

Wooten was precluded from presenting a "third-party" defense. The Court of Appeals held "before a defendant may introduce evidence that another person my have committed the crime, the defendant must show that the evidence has an inherent tendency to connect such other person with the actual commission of the crime."

When Wooten arrived at the victim's apartment, she called a friend and said Wooten was at her apartment "so if anything happens to me you know who was here." The Court of Appeals held this was admissible under the present sense impression exception to the hearsay rule and did not violate the confrontation clause.

***In Re Kory L.*, 295 Ariz. Adv. Rep. 19 (CA 1, 5/13/99)**

A.R.S. § 8-341(H) imposes restitution upon the parents of a juvenile delinquent. The Arizona Court of Appeals held the statute is constitutional. A parent is entitled to a restitution hearing and is not bound by a stipulation of a juvenile.

***Rodriguez v. Arellano*, 295 Ariz. Adv. Rep. 38 (CA 1, 5/13/99)**

Under Arizona Criminal Procedure Rule 16.2, the prosecution has the burden of proof on a suppression motion once a defendant makes a prima facie showing that evidence should be suppressed. A defendant meets this burden of going forward by showing a search was warrantless.

***State v. Hickman*, 295 Ariz. Adv. Rep. 16 (CA 1, 5/11/99)**

The defendant was convicted of burglary in the third degree, a class 4 felony. The prosecution proved the defendant had a prior felony conviction, but failed to prove the date of this prior felony.

A.R.S. § 13-604(U) requires the prior felony be within five years of the new offense. As the prosecution failed to prove this element of an historical prior felony conviction, the matter was remanded for re-sentencing.

***Martin v. Reinstein*, 295 Ariz. Adv. Rep. 21 (CA 1, 5/13/99)**

A.R.S. § 36-3701 through 3716, the Sexually Violent Persons Act, was held to be constitutional. ■

BULLETIN BOARD

New Attorneys

Nine new attorneys will comprise Russ Born's New Attorney Training class beginning on June 21. They are:

Kristina L. Davis received her B.A. in Sociology from North Carolina Sate University. She then earned her J.D. from California Western School of Law. For the past year, she has worked for a private law firm. She will be assigned to Group E.

William P. Fay will join Group C upon completion of training. He attended ASU School of Law where he served as Senior Editor of the ABA Journal of Law Science and Technology. He also holds a M.S. in Civil Engineering from the University of Wisconsin as well as a B.S. in Civil Engineering from ASU. William served as an extern with our office in the fall of 1998.

Henry Gooday, Jr. graduated with a degree in Liberal Arts from Governors State University, then continued to earn his Master of Health Science. He received his J.D.

(cont. on pg. 15) ☞

from Nova Southeastern University in Ft. Lauderdale. His experience in the justice system includes working as an Adult Probation Officer. He will be assigned to Group C.

Theron M. Hall, III is a University of Arizona College of Law graduate. His undergraduate degree was earned at Brigham Young University where he majored in Zoology and Portuguese. He was most recently employed with a private firm that handled estate planning and performed an internship with the Pima County Public Defender's Office. He will be joining Group A.

Daniel J. Healy is slated to join Group B upon completion of training. He comes to the office from the Legal Defender's Office in Navajo County. He earned his B.A. in Microbiology and Chemical Science and then served an internship with the University of Southern California - Los Angles County Medical Center. He received his J.D. from St. Louis University School of Law.

Anthony J. Knowles was previously an associate with a private law firm. He received his J.D. from ASU College of Law where he served internships with the Tempe Prosecutor's Office and the County Attorney's Office. He will be assigned to Group A.

Kendra L. Owens holds a B.A. in Sociology from ASU and her J.D. from the Southwestern University School of Law. She has served as a law clerk for Superior Court Judge Rebecca Albrecht. She will become a member of Group B.

Evan W. Romberg will join Group D upon completion of training. He did an internship with the Broward County Public Defender's Office and served as a volunteer law clerk with our office. He earned his B.A. in Political Science from the University of Toronto and his Chartered Accounting Degree from York University in North York, Ontario. His J.D. was earned at Nova Southeastern University in Ft. Lauderdale.

Hollie K. Taylor has spent the last three years with the Child and Family Protection Division of the Attorney General's Office. Hollie majored in Justice Studies at ASU before continuing on to ASU College of Law to earn her J.D. She will be joining Group E.

In addition to the attorney training class, the following attorneys have joined the office:

William W. Owslery joined the Dependency Division on May 26. Will is a graduate of the University of Arizona College of Law and holds a B.A. in Business Management. He has spent the last three years with the Attorney General's Office in their Child and Family Protective Services Division.

Myrna Parker joined Group D on June 14. She had served as the Chief Public Defender for Navajo County since 1993. Myrna has many years of experience in the County Attorney's office and private practice. Her J.D. was awarded from the University of San Diego School of Law. She earned her B.A. in Social Ecology/Criminal Justice from the University of California at Irvine.

Attorney Moves/Changes

Anthony Bingham left Group C on June 18 to take an attorney position in the Securities Fraud Division of the Arizona Corporation Commission.

Jason Leonard moved from Juvenile SEF to Trial Group C on June 18.

New Support Staff

Jose Encizo, Office Aide, began working in Administration on May 24.

Staff Moves/Changes

Jill Schroeder an Investigator with Group D, left the office on June 25. ■

Have a Happy and Safe

4th of July!!

May 1999
Jury and Bench Trials

Group A

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
5/4-5/5	**Valverde**	Akers	Baker	CR 98-17992 Theft/ F5	Not Guilty	Jury
5/5-5/17	**Hruby**	Cole	Pitts	CR 97-14791 Child Molest/ F2	Hung Jury (6-2 for acquittal)	Jury
5/7-5/25	**Farrell** Robinson	Galati	Krabbe	CR 98-13092 2° Murder/ F1 on probation with prior	Not Guilty	Jury
5/11-5/13	**Reinhardt**	Baca	Lemke	CR 99-00967 2 cts. Agg. DUI/ F4 with a prior on parole	Ct. 1-Guilty of lesser-included Driving on Suspended License/M1 Ct. 2-Guilty	Jury
5/11-5/17	**Green & Pettycrew**	Dougherty	Novak	CR 98-05795 Forgery/ F4	Not Guilty	Jury
5/13-5/14	**Valverde**	Baca	Flores	CR 99-00584 Car Theft/ F3	Not Guilty	Jury
5/17-5/20	**Rempe**	Baca	Todd	CR 99-01826 CR 99-00096 PODP/ F6 PODD/ F4 POEquip/ChmMnuDrg/F4	Not Guilty	Jury
5/18	**Farney** *Brasinskas*	Baca	Pitts	CR 99-02364 Indecent Exporsure(to a minor)/ F5 Indecent Exposure/ F6	Dismissed on day of trial	Bench
5/19-5/25	**Klepper** *Molina*	Akers	White	CR 95-012120 Agg. DUI/ F4	Guilty	Jury
5/20-5/25	**Palmisano**	Gottsfield	Baldwin	CR 98-10930 Theft/ F4	Not Guilty	Jury
5/24-5/26	**Rempe**	Baca	DeVito	CR 98-14911 PODP/ F6 POM/ F6	Not Guilty of PODP Guilty of POM	Jury
5/26-5/27	**Hernandez**	Cole	Hunt	CR 99-01490 POMFS/ F4 PODP/ F6	Not Guilty of Poss. For Sale Guilty of lesser included POM; Guilty of PODP	Jury

(cont. on pg. 17) ☞

Group B

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
5/5-5/6	**Ochs**	Hutt	Worth	CR 90-16690 POND/ F4 PODP/ F6	Not Guilty	Jury
5/10	**Peterson**	Hutt	Bustamante	CR 98-17311 POND, w/ 2 priors/F4	Mistrial	Jury
5/12-5/18	**Gray** Munoz *Oliver*	Bolton	Sorrentino	CR 98-08760 4 Cts. Child Molest/ F2 2 Cts. Sexual Abuse/ F3 1 Ct. Sex w/Minor/ F2 1 Ct. Att. Commit Sex w/Minor/ F3	Not Guilty (all counts)	Jury
5/13-5/14	**Washington & LeMoine** Munoz	Hutt	Worth	CR 99-01425 2 Cts. Sale of Dangerous Drugs/ F2	Guilty	Jury
5/20-5/21	**Gray**	Hutt	Hotis	CR 98-10085 Att. POND/ F5	Guilty	Jury
5/20-5/25	**Liles**	Wotruba	Luder	CR 99-13684 3° Burglary/ F4 Theft/ F6	Not guilty of Burglary Guilty of Theft/1M	Jury
5/24-5/26	**Grant**	Arellano	Davidon	CR 98-14861 & 98-14898 G/T Vehicle/ F3 Agg. Assault/ F3	Guilty	Jury
5/25-5/26	**Colon & Bublik**	Hutt	Boyle	CR 93-01359 Agg. DUI/ F5	Not Guilty Guilty on lesser-included Driving under susp. license/ M1	Jury
5/27-5/27	**Agan**	Hutt	Horn	CR 99-00174 Possession of Narcotic Drugs for Sale/ F2	Guilty	Jury

(cont. on pg. 18) ☞

Group C

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
5/3-5/5	**Corbitt**	Ishikawa	O'Neill	CR 97-95332 1 Ct. Child Molest/ F2	Not Guilty	Jury
5/3-5/6	**Shoemaker**	Dairman	McCauley	CR 98-94088 1 Ct. Disord. Conduct/ F6D	Guilty of Disorderly Conduct/ F6	Jury
5/4-5/6	**Alcock** Moller	Jarrett	Gingold	CR 99-92178 1 Ct. Agg DUI/ F4	Guilty	Jury
5/10-5/11	**Mabius** Beatty	Ishikawa	Brenneman	CR 98-95836 1 Ct. Agg Assault/ F3D	Pled to lesser F6 after jury selection	Jury
5/10-5/12	**Alcock**	Jarrett	Holtry	CR 98-96031 1 Ct. Agg DUI/ F4	Not Guilty Agg DUI Guilty of lesser included misdemeanor DUI	Jury
5/11-5/13	**Vaca**	Aceto	Rosemary Rosales	CR 99-90428 3 Cts. Agg Assault/ F3D 2 Cts. Disord Conduct/ M1	Guilty	Jury
5/13	**Gaziano**	Ishikawa	Brenneman	CR 99-90391 1 Ct. PODD/ F4 1 Ct. POM/ F6	Guilty	Bench
5/13-5/17	**Rosales**	Jarrett	Aubuchon	CR 98-92209 2 Cts. Sexual Conduct w/Minor	Guilty	Jury
5/17-5/18	**Walker**	Hall	Arnwine	CR 99-90166(A) 1 Ct. Unlawful Use of Means of Transportation/ F6	Not Guilty	Jury
5/19-5/24	**Moore**	Jarrett	Click	CR 99-90354 1 Ct. Attempted Sexual Assault/ F3D 1 Ct. Sexual Abuse/ F5D 1 Ct. Kidnaping/ F2D	Guilty	Jury
5/21	**Mabius**	Johnson	Curtis	TR 99-01071 1 Ct. DWI/ M1	Guilty	Jury
5/21	**S. Silva**	Ore	Thorne	TR 98-14627 2 Cts. DUI/ M1; second offense within 60 months	Guilty - both counts	Jury
5/24-5/27	**Lorenz**	Keppel	Cook	CR 99-90357 1 Ct. Unauthorized use of Vehicle/Transportation/ F5	Not Guilty	Jury
5/25	**S. Silva**	Bolton	Holtry	CR 98-95588 2 Cts. Agg DUI / F4; with 5 prior felonies	Plead to misdemeanor DUI after jury selection	Jury
5/25-5/27	**Schmich**	Lowenthal	Arnwine	CR 98-95651 1 Ct. G/T Vehicle/ F3	Guilty	Jury
5/26	**Stein**	Pro Tem Phillips	Brame	CR 99-01169 1 Ct. Interfering with Judicial Proceedings/ M1	Not Guilty	Bench
5/27	**Mabius**	Johnson	Curtis	TR 98-08976 1 Ct. Dr. on Susp. Lic./ M1	Guilty	Bench

(cont. on pg. 19) ☞

Group D

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
4/2-5/7 Intermittent	**Enos**	Katz	Clarke	CR 98-14251 2 Cts. Custodial Interfer./ F4	Guilty	Bench
4/20-5/3	**Stazzone** *Fairchild*	D'Angelo	Altman	CR 98-08325 2 Cts. Child Abuse/F2, DCAC	Not Guilty of F2 Ct. 1 - Guilty of Lesser Offense of Negligent Child Abuse (non-DCAC) Ct. 2 - Directed Verdict of Acquittal	Jury
4/28-5/3	**Force** Bradley	Ellis	Cottor	CR 98-16296 1 Ct. Theft of vehicle/ F5	Not Guilty	Jury
4/28-5/3	**VanWert & Crews**	Katz	Adleman	CR 98-12785 1 Ct. Poss. Crack Cocaine/ F4 1 Ct. Poss.Drug Paraph./ F6	Guilty	Jury
4/29-5/11	**Billar**	P. Reinstein	Alexov	CR 98-14595 1 Ct. Agg. Asslt./ F3; 1 Ct. Agg. Asslt./ F4	Guilty	Jury
5/7	**Billar**	McVay	Hudson	MCR 98-00538A MI 1 Ct. Interfering with Jud. Proceedings/M1	Direct Verdict of Acquittal	Bench
5/7	**Billar**	McVay	Hudson	MCR 99-00287MI 1 Ct. Of Interfering w/Judicial Proceedings/ M1 PV	Dismissed	Bench
5/10-5/11	**Ferragut** Bradley	Hall	Keyt	CR 99-01263 1 Ct. Aggravated Assault/ F3	Not Guilty	Jury
5/10-5/12	**Stazzone** Castro	P. Reinstein	Hammond	CR 98-16393 1 Ct. Drive by Shooting/ F2D 1 Ct. Agg. Assault/ F3D	Ct. 1 - Dismissed Ct. 2 - Guilty	Jury
5/11 5/12	**Schaffer** Bradley	Ellis	Tucker	CR 98-11241 1 Ct. Pos Dangr Drug/ F4 1 Ct. Poss.Drug Paraph./ F6 1 Ct. Marij-Poss/Grow/ F6 w/ two priors	Guilty	Jury
5/11-5/17	**Force** Castro	D'Angelo	Alexov	CR 98-16254 1 Ct. Crim. Damage/ F5	Not Guilty	Jury
5/12	**Leyh**	Anderson	Schultz	CR 94-00091 2 Ct. Agg. Asslt./ F3	Not Guilty	Bench
5/17	**Elm**	Dougherty	Farnum	CR 98-06459 1 Ct. POM, F6	Dismissed w/o prejudice	
5/17-5/19	**Zelms & Lerman**	Katz	Cotter	CR 99-01742 1 Ct. Agg. Asslt., F3	Not Guilty Agg Asslt Guilty of Lesser, disorderly conduct	Jury
5/18	**Merchant**	Arellano	Hammond	CR 98-13529 1 Ct. Burglary/ F4	Guilty	Jury
5/18	**Billar**	P. Reinstein	Keyt	CR 98-17910 1 Ct. Agg. Asslt. (W/Veh)/ F3	Dismissed	Jury
5/19	**Ferragut**	Baca	Worth	CR 98-10975 1 Ct. POM/ F6	Guilty	Jury

(cont. on pg. 20) ☞

DUI Unit

Dates: Start-Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
5/10 -5/13	**Timmer**	Arellano	Rand	CR 98-17131 1 Ct. Leaving the scene of Accident w/Death Injury/ F3	Guilty	Jury
5/11 -5/13	**Carrion**	Akers	Leigh	CR98-11167 2 Ct. Agg DUI/ F4	Guilty	Jury
5/18-5/19	**Timmer**	Jones	Maasen	CR98-014354 1 Ct. Agg DUI/ F4	Guilty	Jury
5/19-5/24	**Carrion**	Reinstein	Garrity	CR98-04256 2 Cts. Agg DUI/ F4	Guilty	Jury

Office of the Legal Defender

Dates: Start - Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result w/ hung jury, # of votes for Not Guilty/Guilty	Bench or Jury Trial
4/28-5/3	**Ivy**	Aceto	Rosales	CR 99-90464 B 1 Ct. POM / F6 1 Ct. PODP / F6	Guilty; Both Cts. designated Misdemeanors by Judge	Jury
5/3-5/10	**Parzych** Horrall	Gerst	Boyle	CR 97-04952 2nd Degree Murder / F1 Agg. Assault / F3 Endangerment (Dang.) / F6 One Dangerous Prior	Murder 2 : Not Guilty Agg. Asslt: Dismsd Endngrmnt (Dang.): Not Guilty	Jury
5/15-5/18	**Babbitt** Williams	P. Reinstein	Pacheco	CR 98-16350 Drive-By Shooting / F2	Not Guilty F2 Guilty of Endangerment	Jury
5/17-5/19	**Evans** Apple	Sheldon	Davidon	CR 98-13870 Agg. Assault / F3 Misconduct w/ Weapon / F4 SOND / F2 POND for Sale / F2	Guilty	Jury
5/17-5/27	**Cleary**	Hilliard	Perry	CR 98-09200 B Att. Fraud Scheme / F3	Not Guilty	Jury
5/21-5/27	**Hughes** & **Keilen** Williams *Rubio*	Hotham	Wendell	CR 98-05875 2 Cts. 1st Degree Murder / F1 2Cts. Agg. Assault / F3 1 Ct. Threatening & Intimidating / F	Mistrial	Jury